immediately reported the matter verbally to the foreman but stated that he was not severely injured. The doctor continued to attend to the workman from time to time. Subsequently a few months later he died as a result of the original injury. No notice of the accident beyond what was verbally given was given by the workman to the employers. His widow subsequently brought an action under the Fatal Accidents Act 1846 for the benefit of herself and her children. At the trial the jury returned a verdict that the deceased had been guilty of contributory negligence and an application was therefore made to the judge to assess compensation under the Workmen's Compensation Act 1906. On appeal it was held that since no 'reasonable cause' within the meaning of s 2 of the 1906 Act had been shown for the failure of the workman to give notice of the accident to his employers the widow was not entitled to compensation under the Act. Lord Cozens-Hardy MR said at p 1030:

> In those circumstances, what was the 'reasonable cause' for the failure to give notice of the accident? I daresay the man was ignorant of the law, but that is no excuse. ... In my opinion, with the greatest possible respect to Channell J, there was no evidence in this case to justify the finding that there was 'reasonable cause' for not giving notice within the meaning which has been given to those words by this court in many cases. I think therefore the appeal must be allowed.

Reverting to the present appeal before us there is room for escape from the strict compliance of the provision of s 12(1) of the Workmen's Compensation Act 1952 and as pointed out earlier this is provided in sub-s (4) of that section. Under the provision of that subsection it is up to the claimant to satisfy the court that the delay in making the claim was due to a mistake or absence from Malaysia or other reasonable cause. But the onus was never discharged by the respondent. The issue was never raised before the Commissioner or the arbitrator and when the issue was raised before the learned judge no explanation was given as required by sub-s (4) of s 12. Therefore, as Davies LJ said in *Riches* v *Director of Public Prosecutions*:[7]

> If there is any room for an escape from the statute, well and good; it can be shown. But in absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail.

We accordingly allow the appeal. Since the issue of limitation was never raised until the appeal before the learned judge we make no order as to costs.

Appeal allowed.

Solicitors: *Ranjit Thomas & Kula; Mohd Akhir & Partners.*

Reported by *Prof Ahmad Ibrahim*

Co-operative Central Bank Ltd v Haji Rosli bin Haji Kamaruddin

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-146 OF 1990
MOHAMED AZMI, AJAIB SINGH AND JEMURI SERJAN SCJJ
13 FEBRUARY 1991

Unincorporated Associations — Claim against co-operative society — Allegation that services of employee had been terminated — Claim for compensation — Claim not disputed but only the quantum — Whether there was a dispute touching business of co-operative society — Co-operative Societies Act 1948, ss 2 & 49(1)

Words and Phrases — 'Dispute' — Co-operative Societies Act 1948, s 49(1)

In this case the appellant co-operative society had been placed in receivership and the receivers had terminated the services of the respondent in the co-operative society. The respondent was requested to submit his claims for compensation and he did so. As he received no replies from the appellant he brought an originating summons alleging that his services had been unlawfully terminated and claiming compensation. The appellant claimed that the dispute was a dispute touching the business of the appellant between the respondent, as an employee and officer of the appellant, and the appellant and that the respondent had not exhausted the remedies available to him under the Co-operative Societies Act 1948. The appellant applied to strike off the respondent's originating summons but this was dismissed. The appellant appealed.

Held, dismissing the appeal:
In this case the appellant did not challenge the validity of the claim for compensation by the respondent under his service agreement but challenged the quantum. It follows therefore that there is no dispute since for the purpose of s 49(1) of the Co-operative Societies Act 1948 the dispute must be a dispute relevant to the existence of the respondent's right to the relief claimed under his service agreement and not merely the quantum of the relief.

[Bahasa Malaysia summary

Di dalam kes ini perayu sebuah syarikat kerjasama telah diletakkan di bawah perintah penerima dan pegawai penerima telah menamatkan perkhidmatan responden di dalam syarikat kerjasama itu. Responden telah diminta mengemukakan tuntutannya untuk mendapat pampasan dan ia telah berbuat demikian. Oleh kerana ia tidak mendapat apa-apa jawapan dari perayu ia telah membawa saman pemula mendakwa bahawa perkhidmatannya telah ditamatkan menyalahi undang-undang dan menuntut pampasan. Perayu mendakwa bahawa pertikaian itu adalah pertikaian berhubung dengan urusan perayu, antara responden sebagai pekerja dan pegawainya dan perayu dan bahawa responden belum menghabiskan pemulihan yang boleh didapati olehnya di bawah Akta Pertubuhan Koperasi 1948. Perayu memohon saman pemula responden itu dibatalkan, akan tetapi permohonan itu telah ditolak. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:
Di dalam kes ini perayu tidak mencabar keesahan tuntutan pampasan oleh responden di bawah perjanjian perkhidmatannya akan tetapi hanya mencabar kuantumnya. Jelaslah tidak terdapat pertikaian oleh kerana untuk maksud s 49(1) Akta Pertubuhan Koperasi 1948, pertikaian itu mestilah satu pertikaian mengenai wujudnya hak responden mendapat remedi yang dituntut di bawah perjanjian perkhidmatannya dan bukan hanya kuantum pemulihan itu.]

Cases referred to

1 *M Arulandan* v *Malaysian Co-operative Insurance Society Ltd* [1987] 1 MLJ 485 (refd)
2 *Professor Dr A Kahar Bador & Ors* v *N Krishnan & Ors (No 2)* [1983] 1 MLJ 412 (refd)
3 *Madhava Rao* v *Surya Rao* AIR 1954 Mad 103 (refd)
4 *Gujarat State Co-operative Land Development Ltd* v *PR Mankad & Anor* AIR 1979 SC 1203 (folld)
5 *Heydon & Anor* v *Bridget Lillis* (1907) 4 CLR 1223 (folld)

Legislation referred to

Co-operative Societies Act 1948 ss 2, 49(1)

Appeal from: Originating Summons No R8-24-7-089 (High Court, Kuala Lumpur)

Robert Lazar (*P Jayasingam* with him) for the appellant.
V Kanagalingam for the respodent.

Cur Adv Vult

Jemuri Serjan SCJ (delivering the judgment of the court): This is an appeal from the decision of the High Court dismissing an application of the appellant under O 18 r 19 of the Rules of the High Court 1980 to strike off the respondent's originating summons. The appeal came up for hearing before us on 25 September 1990 and was dismissed with costs. We indicated that we would give our grounds of judgment later. Here are the grounds of judgment.

The respondent filed an Originating Summons No R8-24-7-089 in the High Court on 8 January 1990, naming the Co-operative Central Bank Ltd (In Receivership) as defendant, and claiming inter alia:

(a) Damages and/or compensation against the defendants for wrongful termination and breach of the service agreement dated 2 September 1986.
(b) An order that the defendants do pay to the plaintiffs a sum of $638,918.91 and a further sum of $133,441.50 be paid by the defendants to the Employees Provident Fund Board.
(c) An account of what is due to the plaintiff from the defendants in respect of the tax free benefits as stipulated in cl 9 of the service agreement.

From the affidavits in support of the application filed on behalf of the respondent the following facts emerged.

Haji Rosli bin Haji Kamaruddin was originally employed by the appellant as its assistant general manager on 2 April 1983 and on 1 January 1986 he was promoted to general manager of the appellant. By 1 June 1986 he was appointed as joint chief executive of the appellant. By a fixed term service agreement dated 2 September 1986 entered into between the respondent and the appellant, the respondent was appointed as the Chief Executive of Corporate Affairs, Business Development & Consumer Services of the appellant with effect from 1 September 1986. The post of chief executive in fact was a re-designation of his earlier post as general manager. However, the appointment of chief executive was only for a period of five years but might be renewed by both sides.

Apart from getting an annual basic salary of $102,000 at the material time the respondent was also entitled to the development incentive allowance of 0.04% of the net profit of the appellant before tax, an annual bonus of not less than 2/12 of his basic last drawn salary, a housing allowance of $2,000 per month and entertainment allowance of $1,500 per month and a fixed servant allowance of $350 per month, all of which were to be paid tax free. There was also a provision for the payment of gratuity at the rate of 2/12 of his last drawn salary payable at the expiration of the contract.

By an order of the High Court dated 7 March 1989, Tuan Haji Zainal Abidin Putih and Tuan Haji Ahmad Kamal bin Abdullah Al-Yaffi of Messrs Hanafiah, Raslan, Mohammed & Co, were appointed receivers to, inter alia, manage the affairs and property of the appellant whereupon the respondent continued in his employment but as deputy chief executive. However, by a letter dated 31 March 1989, his services with the appellant were terminated by the said receivers with effect 1 April 1989 on the grounds that his employment was inconsistent with the functions, powers and duties of the receivers and accordingly surplussed to the requirement of the appellant.

Consequent upon the letter of termination of his services, the respondent was required by the appellant to submit his claims for compensation in accordance with cl 23 of the service agreement which provided that in such a case as this the appellant would compensate the respondent a sum of money equivalent to the total basic salary together with all allowances payable which he would have earned during the unexpired term of the contract as if his services had not been terminated. Accordingly the respondent submitted his claim totalling $467,318.91 made up of his all-in salary for the unexpired period of 29 months, gratuities, paid leave and car benefits, but he received no reply to the letter and the claim.

Thereupon the respondent took steps to make representation under s 20 of the Industrial Relations Act 1967 with a view to seek reinstatement but before the Industrial Court could deal with it the case was withdrawn. Instead the present originating summons was filed.

In his affidavit the respondent averred that the termination of his employment by the receivers of the appellant was wrong in law, untrue, inaccurate, unreasonable, arbitrary, capricious and contrary to the rules of natural justice, or in other words, the termination was unlawful. It may be recalled that in his originating summons he claimed damages and/or compensation

against the appellant for wrongful termination and breach of the service agreement. Paragraph 1 of the originating summons in particular, is relevant. This appears to be the ground for his action by way of the originating summons. Yet in para 23 of his affidavit he averred that on a proper and true construction of his service agreement he was justly and truly entitled in law to claim damages and/or compensation against the appellant on account of the termination of his services as expressly provided for in the service agreement. The former averment confounded the real cause of his action and we think misled the appellant considerably. On a careful study of his affidavit it is established that the real cause of action in the originating summons is not the wrongful termination or breach of, or the right to compensation under the service agreement but a claim for the recovery of compensation to which the respondent is entitled under the service agreement.

This inference is supported by the affidavit of the respondent himself, particularly para 23 of his affidavit in support of the originating summons. Under cl 23 of the service agreement the respondent is entitled in the event of the termination of his services for reasons other than misconduct on his part in respect of the appellant's business or violation of its rules and regulations or on his conviction for a criminal offence which would render the continuation of his appointment as chief executive an embarrassment to the appellant. Under the circumstances the question of wrongful termination of the respondent's services did not arise at all.

The appellant did not file any affidavit in reply to the affidavit of the respondent but instead filed a summons-in-chambers to strike off the originating summons on the grounds that:

(a) it discloses no reasonable cause of action;
(b) it is scandalous, frivolous and/or vexatious;
(c) it may prejudice, embarrass or delay the fair trial of action;
(d) the action is an abuse of the process of the court.

In their affidavit in support of the application to strike off the originating summons the two receivers deposed that the originating summons was misconceived because the dispute was a dispute touching the business of the appellant between the respondent, as an employee and officer of the appellant, and the appellant and because the respondent had failed to exhaust the remedies available to him under the Co-operative Societies Act 1948 ('the Act'). The receivers did not in any way explain the nature of the dispute that they referred to in their affidavit apart from making a general statement as to the existence of the dispute. We therefore surmise from their affidavit that the dispute referred to therein must be the dispute concerning the alleged unlawful termination of the respondent's services and his claim for compensation. The appellant was undeniably misled to believe that the respondent's cause of action was based on the alleged unlawful termination of his services and the claim for compensation by virtue of para 1 of the originating summons and some part of the respondent's affidavit adverted to earlier. Thus Mr Lazar, learned counsel for the appellant, in his reply to Mr V Kanagalingam, emphasized this fact for our benefit.

However, some light was thrown onto this so-called dispute touching the business of the appellant by Mr P Jayasingam in his affidavit. He deposed that the appellant did not at any point in time question the entitlement of the respondent as an employee of the appellant under the terms and conditions of the contract of employment. What was disputed was the actual amount that was due and payable by the appellant to the respondent following the termination of his services with the appellant. In this respect Mr P Jayasingam was referring to a claim in the sum of $467,380.91 made by the respondent in an earlier proceeding, which claim the appellants and their counsel disputed, not, however, on the respondent's right to it but on the actual amount claimed. He further stated that such dispute still subsisted even more so in respect of the claim of compensation for the sum of $772,360.41. He further emphasized that the dispute as to the quantum of the compensation was a dispute touching the business of the appellant and, being such a dispute, it fell to be settled in accordance with the provisions of s 49(1) of the Act. It would follow that until the matter had been dealt with by the Registrar-General of the Co-operative Societies under that section, the High Court had no jurisdiction to hear the originating summons.

In the light of this evidence it is inevitable for us to conclude that the receivers and their counsel, Mr P Jayasingam, viewed the cause of action in the originating summons at cross purposes. When the receivers spoke of the dispute between the appellant and respondent in their affidavit they had in mind the unlawful termination alleged by the respondent and his right to damages or compensation therefrom. On the other hand, their counsel averred in his affidavit that the dispute they were concerned with was the actual quantum of the compensation, and not the unlawful termination nor the right to compensation under cl 23 of the service agreement. Therefore he was at pains to explain in his affidavit the admission that the respondent spoke of on the part of the receivers and their counsel in the earlier proceedings was only an admission relating to the respondent's right to the compensation but not an admission to its actual amount. Thus the dispute on the quantum still persisted. As far as learned counsel was concerned, the question of unlawful termination and the right to compensation did not arise at all, because it was from his point of view never the issue. In other

words, the amount of compensation in the sum of $467,380.91 which the respondent claimed in the earlier proceedings was never admitted and therefore continued to be rejected by learned counsel. This is why in para 8 of his affidavit Mr P Jayasingam said:

> I respectfully say that the plaintiff's contention that the admissions in the earlier proceedings constitute as admission of the plaintiff's claim herein is not tenable on the facts because till the proceedings herein, the plaintiff has not put up any claim in respect of the alleged sum of M$772,360.41.

Although he did not specifically in para 12 of his affidavit refer to the claim for compensation in the sum of $772,360.41 in the present originating summons, the logical inference is that he had in mind that same figure and it can safely and reasonably be presumed that he also rejected this claim. Paragraph 12 of his affidavit is as follows:

> I will further respectfully say that on the totality of the matters raised herein, there has always been, and there is still a dispute as to the actual amount that is due and payable by the defendant to the plaintiff, following the termination of his services with the defendant, and this is a dispute touching on the business of the defendant, and involves a member/officer of a registered society. In consequence, I have advised the defendant that it is incumbent on the part of the plaintiff to very strictly adhere to the provisions of the Co-operative Societies Act of 1948 and the By-laws of the defendant made pursuant thereto.

The only thing that the receivers and their counsel seemed to agree upon was whatever the nature of the dispute as seen from their respective perspective it was nevertheless a dispute touching the business of the appellant.

On our part, having regard to the evidence of the appellant and the respondent in their totality and the provision of cl 23 of the service agreement, the respondent's action was actually grounded upon the amount of compensation of $772,360.41 to which claim he was contractually entitled. It is common ground that the respondent was retrenched when the appellant went into receivership and that his services were not terminated by misconduct or by any other ground stipulated in cl 20 of the service agreement. The compensation for retrenchment is provided for in cl 23 and the amount is equivalent to the total basic salary together with all allowances payable which he would have earned during the unexpired term of contract had it not been for the retrenchment. For the purposes of convenience it is pertinent to reproduce in full cl 20 and cl 23:

> 20 If during the term of this agreement, the executive shall be found to be guilty of any proven misconduct in respect of the bank's business or violation of the bank's rules and regulations or be found guilty of any criminal offence as a result of which the continuation of the executive in his employment by the bank will be embarrassing to the bank it shall be lawful for the bank to terminate the services of the executive and he may be paid such compensation at the discretion of the board of directors based on the nature of the breach.
>
> 23 In the event of the bank terminating the services of the executive for reasons other than as stipulated in cl 20 above, the bank shall compensate the executive by paying him upon such termination a sum of money equivalent to the total basic salary together with all allowances payable which he would have earned during the unexpired term of contract as if he had not been terminated from service.

In the instant case the respondent had asserted his claim to compensation in the sum of $772,360.41 was justified but the appellant had not as yet rejected the claim nor challenged the correctness of the computation of the compensation. It was only assumed that they would dispute the figure, considering that in the earlier proceedings they had rejected the claim for a smaller amount. Assuming the appellant rejected the amount of the present claim the question for our determination is whether a disagreement over the amount of the claim for compensation between the appellant and the respondent amounts to a dispute falling within the ambit of s 49(1).

The appellant had consistently contended that it was such a dispute. Before s 49(1) can be applied to the facts of the present case two conditions which were stipulated therein must be proved to exist, namely, whether:

(a) the respondent was an officer as defined under s 2 of the Act; and
(b) whether the dispute if at all between the appellant and the respondent as such officer was a dispute touching the business of the appellant.

The appellant contended that not only was the respondent an officer within the meaning of the by-laws of the appellant and the Co-operative Societies Act 1948 he was also a member of the appellant. Similarly the dispute, whether it concerned the wrongful termination and the right to compensation or the actual amount of compensation, was a dispute touching the business of the appellant. Cited as authorities, amongst others, are the following cases: *M Arulandan* v *Malaysian Co-operative Insurance Society Ltd*;[1] *Professor Dr A Kahar Bador & Ors* v *N Krishnan & Ors (No 2)*[2] and *Madhava Rao* v *Surya Rao*.[3] Learned counsel for the appellant submitted that both conditions following these authorities were satisfied and the appeal therefore should be allowed.

Arulandan v *Malaysian Co-operative Insurance Society*[1] is a Supreme Court decision which decided that the manager of the Organization and Methods Department of the society was an officer within the meaning of s 2 of the Act and the dispute between the manager and the co-operative society on the withholding of his salary increment as a result of a disciplinary action was a

dispute touching the business of the society. The Supreme Court in that case applied the decision in *Madhava Rao* v *Surya Rao*[3] which is a decision of the Full Bench of the Madras High Court where it was decided that the term 'a dispute touching the business of the co-operative society' was to be given a wider interpretation so as to include a dispute relating to the affairs of the society and not to be limited to its business. In that case the dispute concerned the election of the board of directors of the Co-operative Societies Bank between members of the bank. *Professor Dr A Kahar Bador* v *N Krishnan (No 2)*[2] is a High Court case concerning the dispute over the validity of the election of the Committee of Management of the Mercantile Co-operative Thrift & Loan Society between some members and the former committee of management of the society. It was held by Hashim Yeop A Sani J (as he then was) that the words 'a dispute touching the business of the society' was to be interpreted widely to include the general running of the affairs of the society.

Having regard to the view we take of the issue before us it is not necessary for us to decide whether the respondent was an officer of the appellant for the purpose of s 49(1). We must, however, perforce decide whether there is in fact a dispute between the parties in the first place. This leads us to the question of what is a dispute. In this regard we were referred by learned counsel for the respondent to the Supreme Court of India case of *Gujarat State Co-operative Land Development Ltd* v *PR Mankad & Anor.*[4] Sarkaria J, at p 1207 defined a dispute in the following terms:

> The term 'dispute' means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.

With respect we do not see any reasons to disagree with this definition of dispute. As we have pointed out earlier on while the respondent had consistently asserted his claim in the court below and in previous proceedings in respect of compensation following the termination of his services the appellant had as yet to reject the amount of the claim. That is enough reason for us to hold that as yet there is no dispute. Even if we are wrong on this score there still remains the question — is a disagreement between the parties over the actual quantum of the compensation claimed, ie the sum of $772,360.41, a dispute for the purpose of the Act? In other words a distinction must be drawn between a dispute as to the right to the claim and the actual amount claimed and in this case it is common ground that it is the quantum of the compensation that is being questioned. To decide on this dominant issue we find support from the decision of Griffith CJ, in the case of *Heydon & Anor* v *Bridget Lillis*.[5] The facts of this case are as follows. The plaintiffs are the trustees of a building society. The defendant is an executrix of a deceased member of the society, who had mortgaged a piece of land to the society. By the terms of the mortgage the money was repayable by monthly instalments, and, if default was made in the payment of two such instalments, the mortgagees were entitled to enter upon the land. There is no question as to the execution of the mortgage or as to the default, or as to the plaintiffs' right to maintain an action ejectment, unless there is something in the Act to prevent them. The defendant objects that the plaintiffs' title to sue has not been made out. She bases that objection on three different grounds, the most important being, that under the provisions of the Statute Law of New South Wales such a question cannot be determined by the Supreme Court but must be determined by the district court. In other words the question of wrong jurisdiction was raised by the defendant. At p 1242 Griffith CJ, in determining whether there was a dispute for the purpose of s 59 of the Statute Law of New South Wales, said:

> So far as the provision as to disputes is invoked, I am of opinion that the section has no application. For in this case there is no dispute. The main facts were never really disputed. There is some dispute as to how much is actually due, but, in my opinion, a dispute, in order to be relevant for this purpose, must be a dispute relevant to the existence of the right to the relief claimed by the plaintiff. In this case there is no dispute as to any fact affecting the plaintiff's right to recover.

We are of the view that this proposition of law is applicable to the facts of the instant case and we would adopt it. The appellant and its counsel both in the lower court and before us did not challenge the validity of the claim for compensation by the respondent under cl 23 of the service agreement but had gone so far as to admit his right to the relief. It follows therefore there is no dispute since for the purpose of s 49(1) the dispute must be a dispute relevant to the existence of the respondent's right to the relief claimed under the service agreement and not the quantum of the relief. In the result, applying Griffith CJ's proposition of law in *Heydon*'s case[5] we would dismiss the appeal.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co and Drew & Napier; VK Lingam & Co.*

Reported by *Prof Ahmad Ibrahim*